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(20)

No. 05-1256

FILED
SEP 14 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF OF *AMICUS CURIAE* TRIAL LAWYERS FOR PUBLIC JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF *AMICUS CURIAE*[1]

Trial Lawyers for Public Justice ("TLPJ") is a national public interest law firm that marshals the skills and resources of trial lawyers to create a more just society. TLPJ has pioneered cases advancing consumers' rights, preserving the environment, upholding civil rights and liberties, and safeguarding the civil justice system.

TLPJ seeks to vindicate individual rights by holding wrongdoers accountable for their misconduct. Punitive damages are a vital weapon in this effort. If punitive damages awards are arbitrarily restricted, without allowing for flexibility as warranted by the facts of each case, the purposes these damages are meant to serve – to punish unlawful conduct and deter its repetition – will be thwarted. That is particularly true in an exceptional case such as the present, where the Petitioner and other tobacco companies, working together, have carried out an extended campaign of fraud and deceit, with disastrous consequences for the public health.

In addition, Michael V. Ciresi and Roberta B. Walburn, counsel for *amicus*, represented the State of Minnesota and Blue Cross and Blue Shield of Minnesota in litigation against the tobacco industry from 1994 through 1998. The Minnesota tobacco litigation included an intensive discovery effort, which led to the production of approximately 35 million pages of industry documents. *See generally* Michael V. Ciresi, Roberta B. Walburn & Tara D. Sutton, *Decades of Deceit: Document Discovery in the Minnesota Tobacco Litigation*, 25 WM. MITCHELL L. REV.

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[1] No counsel for a party in this case authored this brief in whole or in part, and no person, other than the undersigned *amicus* and its counsel, has made a monetary contribution to the preparation and submission of this brief. Both parties have consented to the filing of briefs *amicus curiae* in this case. Letters of consent are on file with the Clerk of the Court.

477 (1999). Many of these documents, which detail decades of intentional wrongdoing, were exhibits in the case presently before this Court.

These documents – and the long-standing fraudulent conduct of Petitioner – present a compelling paradigm for a large award of punitive damages. Accordingly, TLPJ submits this *amicus* brief in support of respondent.

SUMMARY OF ARGUMENT

Litigation against the tobacco industry began in 1954. The industry faced a collective crisis – a great cancer scare – that threatened its existence. Together, the tobacco companies, including Petitioner Philip Morris USA ("Philip Morris"), fought back with a campaign of deceit and deception. Part of that campaign was waging a war of attrition in courtrooms around the nation, abusing the legal process and concealing evidence.

For year after year, decade after decade, individual smokers sued tobacco companies, including Petitioner. The industry beat them back with aggressive, no-money-spared litigation. For decades, the industry paid not one penny, by way of judgment or settlement.

While the tobacco industry's unblemished winning streak remained intact, the industry kept its internal company documents – damning evidence that directly refuted its litigation positions – hidden away. For example, while the battleground in the early cases was whether smoking caused cancer, by the 1950s virtually the entire industry recognized the causal link, according to industry documents. But it took more than 40 years of litigation, until the late 1990s, for millions of pages of these industry documents to be disclosed.

Because Petitioner was able to evade accountability for so long, it was not forced to bear the costs of its transgressions. There was no financial incentive, as there typically is through tort law, for Petitioner to change its conduct, and so its wrongdoing continued. Thus, as recently as August 2006, the federal judge presiding over the

U.S. Department of Justice ("DOJ") tobacco litigation found that Petitioner and the industry engaged in a 50-year scheme in violation of racketeering laws – "with little, if any, regard for individual illness and suffering . . . or the integrity of the legal system" – and further found that the racketeering continues to this day.

With this history, the award of punitive damages in this case – which amounts to little more than 2½ weeks of Petitioner's profits – fits within this Court's jurisprudence. If ever there was a defendant whose conduct demonstrates the necessity of this Court "consistently reject[ing] the notion that the constitutional line is marked by a simple mathematical formula" for punitive damages, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996) – this is that defendant. This defendant also demonstrates the need to assess the impact of the defendant's similar – in fact, identical – conduct on nonparties. In sum, this case, and its extraordinary facts, demonstrate that flexibility in the due process analysis is essential to achieve the purposes of punitive damages – to punish and to deter.

ARGUMENT

I. THE TOBACCO INDUSTRY HAS EVADED LIABILITY FOR DECADES BY ABUSING THE LEGAL PROCESS AND CONCEALING EVIDENCE - AND THE RESULT HAS BEEN A PUBLIC HEALTH CATASTROPHE

A. General Patton Goes to Court

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his.

Memorandum from R.J. Reynolds Tobacco attorney (Apr. 29, 1988), quoted in *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (D.N.J. 1993).

1. The First Wave of Personal Injury Litigation

In the early 1950s, several scientific studies linking smoking and lung cancer were published. This caused a public sensation and a great cancer scare. In response, in December 1953, the leaders of the tobacco companies – including the president of Philip Morris – met in New York's Plaza Hotel to formulate a plan of action, as detailed in an industry document from that time. Hill & Knowlton, Background Material on the Cigarette Industry Client (Dec. 15, 1953), http://legacy.library.ucsf.edu/tid/wyb42c00.[2] This was the first meeting of the industry executives in years, as "criminal convictions" under antitrust laws had led them to keep their distance. *Id.* But with the death toll from lung cancer at 25,000 a year and rising, the "very existence" of the tobacco industry was threatened. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 858 (1992).

As a result of the Plaza Hotel meeting, the industry – including Philip Morris – published a full-page advertisement in newspapers around the country on January 4, 1954, titled "A Frank Statement to Cigarette Smokers." J.A. 202a-04a. The "Frank Statement" was the symbolic kickoff of the industry's decades of deceit:

> • The "Frank Statement" raised doubts about the causal link between smoking and disease: "For more than 300 years tobacco has given solace, relaxation, and enjoyment to mankind. At

[2] This tobacco document and the others cited herein are posted in full text by the Legacy Tobacco Documents Library, a digital library established by the University of California, San Francisco Library and the American Legacy Foundation (which was created as a result of the Master Settlement Agreement between state attorneys general and the tobacco industry).

one time or another during those years critics have held it responsible for practically every disease of the human body. One by one these charges have been abandoned for lack of evidence."

- The "Frank Statement" propounded misrepresentations and false promises: "We accept an interest in people's health as a basic responsibility, paramount to every other consideration in our business. We believe the products we make are not injurious to health. We always have and always will cooperate closely with those whose task it is to safeguard the public health."
- The "Frank Statement" announced the creation of the Tobacco Industry Research Committee, later re-named the Council for Tobacco Research, which the industry proclaimed would conduct research under the direction of "a scientist of unimpeachable integrity," but which in fact served as a foundation of the industry's conspiracy.

That same year, 1954, the first personal injury cancer case was filed against the tobacco industry. Rabin, *supra*, at 857. The industry dug in. For decades, the companies worked together to counter claims against cigarettes and preserve their market. (The Oregon Supreme Court decision in this case is replete with references to industry-wide cooperation. *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1168-70 (Or. 2006)). The industry's self-proclaimed General Patton-style of litigation took hold: aggressive, scorched-earth tactics, no offers of settlement (not "a penny," in the words of Philip Morris's general counsel),[3] and concealment of internal documents evidencing the industry's admissions that its product caused death and disease.

This was a strategy "unique in the annals of tort litigation." Rabin, *supra*, at 857. "From the beginning, the

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[3] *See Haines*, 814 F. Supp. at 421 n.13.

cigarette companies decided that they would defend every claim, no matter what the cost, through trial and any possible appeals." *Id.*

In the early years of litigation, the battleground was causation: did cigarette smoking cause lung cancer (and was that foreseeable)? A few early cases that persevered to trial illustrate the dominance of the causation issue and the industry's war of attrition:

- **Green v. American Tobacco:** This case wound through 12 years of litigation, two trials, five appeals, and two unsuccessful petitions for certiorari to this Court. Rabin, *supra*, at 861. In the first trial, eight physicians testified for each side – 16 in all. *Green v. American Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962). The jury found that the plaintiff's lung cancer was caused by smoking but no liability on the ground that the defendant could not have reasonably foreseen that cigarettes caused cancer. *Id.* at 71-72.

  In the second trial, the judge ruled that a breach of implied warranty required that defendant's cigarettes "endanger any responsible segment of the general public." *Green v. American Tobacco Co.*, 391 F.2d 97, 101-02 (5th Cir. 1968). This led, once again, to "a forensic battle of experts." *Id.* at 103. Defense experts testified that "[n]obody knows the cause" of lung cancer. *Id.* This appears to have been the decisive issue. *See Green v. American Tobacco Co.*, 409 F.2d 1166, 1167 (5th Cir. 1969) (Coleman, J., dissenting) (defendant evaded liability "by convincing a lay jury in a swearing match among super-scientists that such a product may somehow be reasonably safe for personal consumption by the general public."), *cert. denied*, 397 U.S. 911 (1970). Again, there was a verdict for defendant, which was upheld by the Fifth Circuit. *Id.*

  Even years before the *Green* litigation ended, however, the industry's internal documents already demonstrated widespread acknowledgement that smoking caused cancer.

- **Lartigue v. R.J. Reynolds Tobacco and Liggett and Meyers Tobacco:** Again, causation played a determinative role. The trial record filled 20 volumes, "most of it devoted to medical opinion." *Lartigue v. R.J. Reynolds Tobacco Co.*, 317 F.2d 19, 22 (5th Cir.), *cert. denied*, 375 U.S. 865 (1963). The jury heard details of the plaintiff's "long medical history": measles, pertussis, diphtheria, malaria, influenza, chronic tonsillitis, pyorrhea, gonorrhea, tertiary syphilis, rheumatism, and "all of his teeth pulled." *Id.* The tobacco companies argued "that, except for rheumatism, all of these ills aggravate and are suspected causes of cancer." *Id.* As remarkable as these arguments are by today's standards – and by the defendants' contemporaneous but secret documents at the time of the trial – they apparently swayed the jury. Thus, the trial judge stated that the jury "simply decided the plaintiff had failed to prove the causal connection between his smoking and his lung cancer. . . ." *Id.* at 23. The Fifth Circuit affirmed. *Id.*

- **Ross v. Philip Morris:** This case lasted 10 years, from 1954 through 1964. At trial, six physicians testified for Philip Morris that cigarettes did not cause the plaintiff's throat cancer, with some also testifying that alcohol was a suspected cause. *Ross v. Philip Morris & Co. Ltd.*, 328 F.2d 3, 5 (8th Cir. 1964). Thus, Philip Morris hid its internal knowledge of the causal connection between smoking and cancer and blamed alcohol, with trial evidence that included plaintiff's "history of indulgence, heavy at times, in alcoholic liquor" and arrests for driving while intoxicated. *Id.* The general verdict for Philip Morris was affirmed on appeal. *Id.*

One more case from the first wave of litigation demonstrates the frustration – and inability – of a trial judge in trying to control the industry's litigation conduct. The case of *Thayer v. Liggett & Myers Tobacco Co.*, 1970 U.S. Dist. LEXIS 12796 (D. Mich. 1970), ended in a jury verdict

for defendant. Afterwards, the trial court – disturbed by the defendant's "overwhelming superiority in resources" and "insatiable appetite for procedural advantage" – detailed the abuses. *Id.* at 18, 19. Among other things, the court noted that the defendant was evasive in discovery, *id.* at 5-6, 9-10; "confidently risked tactics" knowing that the plaintiff "could not afford the luxury of a mistrial," *id.* at 18, and obtained a sweeping protective order, "on grounds which later proved largely illusory," to isolate plaintiff's counsel. *Id.* at 16; *see also id.* at 10-14. Meanwhile, defense counsel freely engaged in extensive cooperation with other industry attorneys. *Id.* at 15 & n.8, 16, 17 n.10, 101-02.

The court concluded:

> The court is convinced that the magnitude of the impact of the disparity in resources between these parties, plus the sophisticated and calculated exploitation of the situation by the defendant, approaches a denial of due process which would compel the granting of a new trial.
>
> This question, unfortunately, is now moot because plaintiff cannot afford further proceedings.

Id. at 59.

2. The Second Wave of Personal Injury Litigation

The second wave of personal injury suits against the tobacco industry began in the 1980s. Rabin, *supra*, at 854. The industry's theme shifted to arguing that the hazards of smoking were common knowledge and that smokers were exercising their "freedom of choice" – and assuming the risk. *Id.* at 870. In short, the industry seamlessly shifted its battle cry from "smoking doesn't cause cancer" to "everybody knows." "Everybody," that is, except the

tobacco industry, which continued to assert that it was "not proven" that smoking caused any disease.[4]

The most notable case in the second wave of litigation was the *Cipollone* suit in New Jersey, which led to the first meaningful discovery of tobacco industry documents. Ciresi et al., *supra,* at 486. The result was the first verdict for a plaintiff. The judgment, however, was reversed in part on the issue of preemption, and remanded for further proceedings. *Cipollone v. Liggett Group, Inc.,* 505 U.S. 504 (1992).

Following this Court's decision, the *Cipollone* plaintiffs, after a decade of litigation, consented to a voluntary dismissal with prejudice. *See Haines*, 814 F. Supp. at 417 n.4. The New Jersey plaintiffs' attorneys – recognized at the time as "the leading law firm" in tobacco litigation – also moved to withdraw from related tobacco cases, citing the "unreasonable financial burden." *Id.* at 418, 425. In 10 years, not a single of the firm's cases had been resolved on the merits. *Id.* at 421 n.14.

Given this record, no lawyer was willing to take over these cases. *Id.* at 425. This was a familiar theme. As two other attorneys from the era wrote:

> The reality for most cigarette disease victims and their families is that they cannot find a lawyer to handle their case, no matter how hard they look. . . . [B]y making the cost of litigation so high, the cigarette manufacturers have closed

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[4] As late as 1998, Geoffrey C. Bible, chief executive officer of Philip Morris, testified that "everybody in the world believes smoking causes disease." But when asked if *he* believed smoking causes disease, Bible testified, "I don't know." Bible further testified:

> Q. Do you know how many have died as a result of smoking?
>
> A. How many people have died?
>
> Q. Died.
>
> A. I don't know if anybody has died. I just don't know, no.

Ciresi et al., *supra*, at 485 n.34.

> the courthouse doors to most people who have gotten sick or died from using their products.
>
> They have done this by resisting all discovery aimed at them. . . . They have done it by getting confidentiality orders attached to the discovery materials they finally produce, . . . forcing each plaintiff to reinvent the wheel. They have done it by taking exceedingly lengthy oral depositions of plaintiffs and by gathering . . . every scrap of paper ever generated about a plaintiff, from cradle to grave. And they have done it by taking endless depositions of plaintiffs, expert witnesses, and by naming multiple experts of their own for each specialty, such as pathology, thereby putting plaintiffs' counsel in the position of taking numerous expensive depositions or else not knowing what the witness intends to testify at trial. And they have done it by taking dozens and dozens of oral depositions, all across the country, of trivial fact witnesses, particularly in the final days before trial.

William E. Townsley & Dale K. Hanks, *The Trial Court's Responsibility to Make Cigarette Disease Litigation Affordable and Fair*, 25 CAL. W. L. REV. 275, 276-77 (1989).

Other plaintiffs' attorneys from this time described similar tactics: "[T]he Defendants then began noticing depositions and subpoenaing witnesses for depositions virtually all over the United States. Defendants deposed anyone and everyone remotely connected with Plaintiff, including childhood friends, former spouses, former spouses of family members, neighbors and store owners in the neighborhood where Plaintiff lived," *id.* at 297; "[T]he cigarette company defendants took 107 depositions, many of out-of-state persons, and used only two of them at trial," *id.* at 299; "Elementary school records from the 1930s from a small town in Kentucky were obtained. When an objection

was made, the explanation was that he might have had a health course in the elementary grades." *Id.* [5]

In the end, this round of litigation concluded with the tobacco industry's undefeated record intact. After almost 40 years of litigation, and 300 cases filed since the 1950s, there still was not a single judgment – or penny paid – to plaintiffs. *Haines*, 814 F. Supp. at 428 n.31.

3. The Attorneys General Litigation

The third wave of tobacco litigation began in 1994. Ciresi et al., *supra*, at 487-88. This era included new types of cases, including class actions. But the major breakthrough came in the attorneys general litigation, when Mississippi and then Minnesota were the first states to file suits to recoup the costs of medical care for smokers. *Id.* Soon the industry and its counsel were facing not individual smokers but attorneys general across the nation. The damages claims measured well into the billions of dollars. And discovery battles were forcing the production of millions of documents that had never before seen the light of day, disclosing the industry's secret acknowledgement of the health hazards of smoking, the intentional manipulation of nicotine, and marketing to – and addicting – youth to replace smokers who died. *Id.* at 479.

The industry could no longer maintain its "no settlement" strategy. In 1997 and 1998, the tobacco industry entered into settlement agreements, first with four individual states and then a Master Settlement Agreement with the remaining 46 states. The settlement agreements provided for the payment of billions of dollars to the states. In addition, there was an array of non-monetary relief. This included restrictions on the advertising,

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[5] In addition, "One strange tactic has emerged in cancer cases. The cancer type is always accused of being some strange, nonsmoking type." *Id.* at 303. Compare, in the present case, *Williams v. Philip Morris Inc.*, 48 P.3d 824, 829 n.4 (Or. Ct. App. 2002) ("*Williams I*") ("Defendant's experts testified that Williams had an extremely rare form of cancer that is not related to smoking.").

marketing, and promotion of cigarettes (prohibiting targeting youth, banning the use of cartoons, banning billboards, etc.). The settlements also provided for dissolution of tobacco industry trade groups. *See generally* National Association of Attorneys General Projects: Tobacco, http://naag.org/issues/issue-tobacco.php.

And the settlement agreements provided for the public release of millions of pages of previously secret tobacco company documents.

B. The Tobacco Documents

1. The Concealment

Industry lawyers were well aware that disclosure of their documents would change results in courtrooms. For example, in 1970, David Hardy of Shook, Hardy & Bacon, longtime counsel to tobacco companies and one of Petitioner's law firms in the district court, J.A. 18a, detailed his fears about the industry's documents:

> Fundamental to my concern is the advantage which would accrue to a plaintiff able to offer damaging statements or admissions by persons employed or whose work was done in whole or in part on behalf of the company defending the action. A plaintiff would be greatly benefited by evidence which tended to establish actual knowledge on the part of the defendant that smoking is generally dangerous to health, that certain ingredients are dangerous and should be removed, or that smoking causes a particular disease. *This would not only be evidence that would substantially prove a case against the defendant company for compensatory damages, but could be considered as evidence of willfulness or recklessness sufficient to support a claim for punitive damages. The psychological effect on judge and jury would undoubtedly be devastating to the defendant.*

Letter from David Hardy to DeBaun Bryant, Brown & Williamson Tobacco Corp. ("Brown & Williamson") 3-4

(Aug. 20, 1970), http://legacy.library.ucsf.edu/tid/tjc72d00 (emphasis added).

After the disclosures in *Cipollone*, the next documents breakthrough came in 1994, in quite a different manner. A paralegal working for a tobacco law firm took and distributed several thousand pages of internal documents. These were so explosive that The Journal of the American Medical Association ("JAMA") devoted virtually an entire issue to them, stating that the documents "make clear how the tobacco industry has been able to avoid paying a penny in damages and how it has managed to remain hugely profitable from the sale of a substance long known by scientists and physicians to be lethal." James S. Todd et al., *The Brown and Williamson Documents: Where Do We Go From Here?* 274 JAMA 256, 256 (1995).

And these documents were only the beginning. Next came the massive discovery effort in Minnesota.

It was an effort that no individual personal-injury plaintiff could have undertaken. Industry counsel fought disclosure at virtually every turn. There were word games, with defense counsel objecting to countless terms in document requests (for example, "addictive," "target levels of nicotine," and "document destruction policies"). Ciresi et al., *supra*, at 490. There were shell games. Philip Morris, for example, shielded scientific documents with its foreign affiliates, such as its INBIFO center in Cologne, Germany, "a locale where we might do some of the things which we are reluctant to do in this country." Philip Morris U.S.A. Inter-Office Correspondence, H. Wakeham to C.H. Goldsmith (Apr. 7, 1970), http://legacy.library.ucsf.edu/tid/rzq24e00; *see also Williams*, 127 P.3d at 1169 (Petitioner conducted research in its European laboratory and was "careful to avoid preserving records of the results in this country."); Ciresi et al., *supra*, at 494-98.[6]

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[6] One document illustrating Philip Morris's attempt to conceal documents abroad is a handwritten note by the company's research director, which stated:

(Continued on following page)

There were countless motions to compel. One battle – over production of the industry's document indices – lasted 16 months, with eight orders in the trial court, unsuccessful appeals by the industry to the Minnesota appellate courts, and a petition for certiorari to this Court, which was denied. At first, industry attorneys claimed that they had no relevant indices. Later, industry attorneys acknowledged their existence – indeed, one company stated that it spent $90 million on its indices – but claimed they were protected by the attorney-client or work product doctrines. When the indices finally were produced, then-President Clinton called them a "road map" that "could improve significantly the ability of public health experts, scientists, state and federal officials, and the public to search through industry documents." Ciresi et al., *supra*, at 490-94.

But the most intense discovery effort in the Minnesota litigation – with more than 20 trial court orders, multiple appeals, and another unsuccessful petition for certiorari to this Court – was waged over documents that industry attorneys withheld on claims of attorney-client and work product protection. *Id.* at 499, 555-57. Many documents withheld on claims of privilege were authored by scientists but laundered through lawyers to conceal industry knowledge of health hazards. *Id.* at 507, 509, 512. Philip Morris, for example, listed on its Minnesota privilege log more than 5,000 documents either authored by or received by its top-ranking scientists. *Id.* at 507.

Ultimately, more than 39,000 documents listed on the industry's privilege logs were ordered produced, with the

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1. Ship all documents to Cologne. . . .
2. Keep in Cologne.
3. OK to phone & telex (these will be destroyed.). . . .
6. If important letters or documents have to be sent, please send to home – I will act on them and destroy.

Handwritten notes by Thomas Osdene, http://legacy.library.ucsf.edu/tid/iyu53e00. In his deposition, Osdene pled the Fifth Amendment. Ciresi et al., *supra*, at 495.

trial court – ruling on privilege claims by categories because of the sheer volume of withheld documents – finding that the documents were not privileged in the first instance or were discoverable under the crime-fraud exception. *Id.* at 552-57; *see also Clark v. United States*, 289 U.S. 1, 15 (1933) ("The privilege takes flight if the relation is abused.")[7]

All together, approximately 35 million pages of documents were produced in the Minnesota litigation. Ciresi et al., *supra*, at 479. Philip Morris alone produced more than six million pages in Minnesota – compared with only about 140,000 pages in all the previous years of litigation. *Id.* at 489. Another company, Brown & Williamson, produced more than four million pages in Minnesota – and only 1,350 pages in prior litigation. *Id.*

2. The Industry Admissions

When finally disclosed, the words of tobacco executives themselves provided an extraordinary window into the industry's long-standing fraudulent conduct. As the Oregon Supreme Court stated:

> [T]here can be no dispute that Philip Morris's conduct was extraordinarily reprehensible. Philip Morris knew that smoking caused serious and sometimes fatal disease, but it nevertheless spread false or misleading information to suggest to the public that doubts remained about that issue. It deliberately did so to keep smokers smoking, knowing that it was putting the smokers' health and lives at risk, and it continued to do so for nearly half a century.

William, 127 P.3d at 1177.

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[7] Other courts have also found that the tobacco industry abused claims of privilege. *See United States v. Philip Morris USA, Inc.*, No. 99-2496, at 1473-77 (D.D.C. filed Aug. 17, 2006) ("DOJ Final Opinion") (citing cases).

The impact the documents would have had on the early litigation – if the industry's secrets had been disclosed or if the industry had taken public and litigation positions consistent with its documents – is evident from an examination of even a few documents.

a. Causation

While the courtroom battles in the early litigation were being fought over whether smoking caused cancer, the tobacco companies themselves had already secretly acknowledged the causal link.

One document captures the admissions of the entire industry, as early as 1958. That year, three scientists from the British-American Tobacco Group ("BAT") visited the United States to learn "the extent to which it is accepted that cigarette smoke 'causes' lung cancer." H.R. Bentley et al., Report on Visit to U.S.A. and Canada 2 (1958), http://bat.library.ucsf.edu/tid/jrc54A99. Their itinerary showed visits to most of the American tobacco industry, including Philip Morris. *Id.* at 1. When they returned, the scientists wrote a trip report, stating:

> *With one exception . . . the individuals whom we met believed that smoking causes lung cancer* if by "causation" we mean any chain of events which leads finally to lung cancer and which involves smoking as an indispensable link.
>
> . . .
>
> Although there remains some doubt as to the proportion of the total lung cancer mortality which can be fairly attributed to smoking, *scientific opinion in U.S.A. does not now seriously doubt that the statistical correlation is real and reflects a cause and effect relationship.*

Id. at 2, 8 (emphasis added).[8]

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[8] The 1958 trip report was admitted into evidence in the present case and was cited by the Oregon Supreme Court. *Williams*, 127 P.3d at 1169; *see also* Ex. 28.

But it would take more than 40 years – until 2000, after the disclosure of this trip report and millions of other damning documents – for Philip Morris to publicly admit that smoking caused cancer and other diseases. DOJ Final Opinion 327.[9] Indeed, in the present case, Philip Morris maintained through trial that it was not proven that smoking caused cancer. *See* J.A. 52a.

The refusal to admit that smoking caused disease was driven by the industry's legal strategy. One document, written by a top attorney with BAT's American affiliate discussed the sentiment in chilling fashion:

> If we admit that smoking is harmful to "heavy" smokers, do we not admit that BAT has killed a lot of people each year for a very long time? Moreover, if the evidence we have today is not significantly different from the evidence we have five years ago, might it not be argued that we have been "willfully" killing our customers for this long period? Aside from the catastrophic civil damage and governmental regulation which would flow from such an admission, I foresee serious criminal liability problems.

Draft Memorandum, New Strategy on Smoking & Health, J.K. Wells, Brown & Williamson, para. 4 (1980), http://legacy.library.ucsf.edu/tid/edz95a00.[10]

Similarly, Philip Morris's research director acknowledged in 1961 that cigarettes contained many carcinogens, but "[i]nternal company memoranda . . . suggested that it could not admit those facts publicly because of adverse legal consequences." *Williams*, 127 P.3d at 1169.

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[9] Even to this day, however, Philip Morris "has never told its customers on its cigarette packaging or in onserts that it agrees that smoking causes cancer and other diseases in smokers. Its packages merely direct smokers to its website address." DOJ Final Opinion 328.

[10] In its brief, Petitioner criticizes the Oregon Supreme Court for comparing its conduct to manslaughter. Pet'r Br. 43. As demonstrated by the above document, however, criminal liability was a serious concern in the industry.

b. Addiction

By the second wave of tobacco litigation, the industry's theme was "freedom of choice." Privately, however, the industry recognized that this defense would be compromised by any admission that its customers were addicted.

One Tobacco Institute document, written on the eve of the second wave of litigation in 1980, summed up the effect of such an admission, stating, "Shook, Hardy reminds us, I'm told, that the entire matter of addiction is the most potent weapon a prosecuting attorney can have in a lung cancer/cigarette case. We can't defend continued smoking as 'free choice' if the person was 'addicted.'" Memorandum from P. Knopick to W. Kloepfer 2 (Sept. 9, 1980), http://legacy.library.ucsf.edu/tid/ciu91f00.[11]

The industry's secret documents also described the purposeful manipulation of nicotine to exploit its addictive qualities. *See, e.g.*, Richard D. Hurt & Channing R. Robertson, *Prying Open the Door to the Tobacco Industry's Secrets About Nicotine: The Minnesota Tobacco Trial*, 280 JAMA 1173, 1178 (1998) ("Perhaps the most surprising finding in the document review was the evidence of industry-wide efforts spanning 3 decades to alter the chemical form of nicotine to increase the percentage of freebase nicotine delivered to smokers."); *see also Williams*, 127 P.3d at 1169 (Petitioner "spent considerable effort discovering ways to deliver the optimal dose of nicotine in each cigarette. . . .").

But Petitioner did not admit addiction publicly until 2000. DOJ Final Opinion 327.[12] Once again, legal strategy drove industry conduct on this critical public health issue.

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[11] The Tobacco Institute acted on behalf of Petitioner, *Williams I*, 48 P.3d at 834 n.13, and this document was admitted into evidence in the present case. Ex. 110.

[12] Philip Morris, however, still does not admit addiction in its product labeling. *Id.* In addition, Philip Morris removed the statement that "Smoking Is Addictive" from cigarette packs after buying brands from a competitor in 1999, even though the company agreed that the statement was "correct and material." *Id.* at 1608.

C. The Tobacco Industry's Wrongdoing Continues

The tobacco industry's decades of deceit are not only a matter of historical import. The past wrongdoing continues to kill thousands of smokers (such as respondent, who began smoking in the early 1950s as the industry conspiracy took hold. *See Williams*, 127 P.3d at 1168). In addition, the wrongdoing itself continues.

Thus, while Petitioner argues that it has changed its ways and that there will not be "any repetition of the conduct at issue here," Pet'r Br. 39-40, a blistering rebuke came just one month after Petitioner wrote these words. In August 2006, the district court in the DOJ tobacco litigation found that the industry – including Petitioner – "violated and continue to violate" the Racketeer Influenced and Corrupt Organizations Act ("RICO") and that "[t]here is a reasonable likelihood that Defendants' RICO violations will continue in most of the areas in which they have committed violations in the past." DOJ Final Opinion 1, 1606.[13]

This order was entered after seven years of litigation, the production of millions more pages of documents, and a bench trial of nine months. *Id.* at 3. The court found "overwhelming evidence," *id.* at 2, and summarized the industry's scheme as follows:

> [O]ver the course of more than 50 years, Defendants lied, misrepresented, and deceived the American public, including smokers and the young people they avidly sought as "replacement smokers," about the devastating health effects of smoking and environmental tobacco smoke, they suppressed research, they destroyed documents, they manipulated the use of nicotine so as to increase and perpetuate addiction, they distorted

[13] Philip Morris immediately announced that it would seek appellate review. *See* http://altria.com/media/press_release/03_02_pr_2006_08_17_01.asp.

> the truth about low tar and light cigarettes so as to discourage smokers from quitting, and they abused the legal system in order to achieve their goal – to make money with little, if any, regard for individual illness and suffering, soaring health costs, or the integrity of the legal system.

Id. at 1500-01.

Repeatedly, the court cited the industry's abuse of the legal system, stating that, "At every stage, lawyers played an absolutely central role in the creation and perpetuation of the Enterprise and the implementation of its fraudulent schemes." *Id.* at 4. The court found that these actions furthered the RICO enterprise's goals, which included "avoiding or, at a minimum, limiting liability for smoking and health related claims in litigation." *Id.* at 1526.

The court also detailed the industry's manipulation of nicotine, finding that "[d]efendants have designed their cigarettes to precisely control nicotine delivery levels and provide doses of nicotine sufficient to create and sustain addiction." *Id.* at 515. Again, this is an issue of continuing significance. A study published shortly after the DOJ decision, for example, reported that nicotine yields rose an average of almost 10% from 1998 to 2004. *See* David Brown, *Nicotine Up Sharply in Many Cigarettes*, WASH. POST, Aug. 31, 2006, at A1 (citing study by the Massachusetts Department of Public Health). An increase of 12%, above the average, was reported for Petitioner's Marlboro cigarettes – the choice of two-thirds of high school smokers. *Id.*[14]

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[14] The court in the DOJ action awarded a variety of injunctive relief, including the dissemination of corrective health statements and the maintenance of websites and depositories for industry documents. However, the court found that a number of significant remedies – including a national smoker cessation program costing billions of dollars – were not available because of the limitation of relief under RICO. *Id.* at 3.

D. The Public Health Catastrophe

With the tobacco industry unscathed for so long in the courtroom, there was no incentive – as there typically is through tort law – for the industry to pay for the harms it caused and to change its conduct. Even now, with the industry losing some cases, the relief awarded to date has been scarcely comparable to the harm wreaked. The result of this unchecked wrongdoing is a public health catastrophe.

As this Court wrote in 2000, cigarette smoking is "one of the most troubling public health problems facing our Nation today. . . ." *FDA v. Brown & Williamson Tobacco Corp.*, 539 U.S. 120, 125 (2000). Cigarettes kill – often "long and painful deaths," in the words of the Food and Drug Administration ("FDA") – when used as intended. *Id.* at 135. Citing FDA documentation, this Court recited the litany of statistics. One in three regular smokers dies from cigarette-caused disease. *Id.* That amounts to more than 400,000 deaths each year in the United States from tobacco-related illnesses, including cancer, respiratory illnesses, and heart disease. *Id.* at 127-28. (With approximately half of the domestic market share, Philip Morris products cause 200,000 of those deaths. *See* Tr. Vol. 14-A at 57.) Tobacco use is the leading cause of preventable death in the United States, killing more people than AIDs, car accidents, alcohol, homicides, illegal drugs, suicides, and fire – combined. 539 U.S. at 135.

One commentator, writing in 1980, stated, "A striking irony emerges when one considers that the industry that markets the most dangerous product sold in America is the only industry that has been completely sheltered from the storm of twentieth-century product liability." Donald W. Garner, *Cigarette Dependency and Civil Liability: A Modest Proposal*, 53 S. CAL. L. REV. 1423, 1424 (1980).

A "striking irony," perhaps, but not happenstance. Cigarettes became "the most dangerous product" in part because the tobacco industry was not held accountable in court. Now, as the industry's past finally begins to catch

up with it, the full panoply of remedies – including punitive damages – is necessary to achieve justice.

II. THE AWARD OF PUNITIVE DAMAGE IN THIS CASE FITS WITHIN THIS COURT'S PRIOR JURISPRUDENCE

A. Petitioner's Evasion of Liability Must Be Taken Into Account to Achieve Punishment and Deterrence

This Court has repeatedly recognized that the central purposes of punitive damages are to punish the defendant and to deter future wrongdoing. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003) (punitive damages "are aimed at deterrence and retribution."); *Gore*, 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interest in punishing unlawful conduct and deterring its repetition."). The goal of deterrence applies not only to the defendant but to others as well. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (approving a jury instruction that punitive damages protect the public by deterring "'the defendant and others from doing such wrong in the future.'"); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981) (punitive damages intended "to punish the tortfeasor" and "to deter him and others from similar extreme conduct.").

Clearly, if a defendant engages in a long campaign of fraud and deceit, that must be taken into consideration when it is finally caught. Otherwise, with the prospect of extraordinary profits from unpunished conduct, neither punishment nor deterrence will be achieved.

Judge Posner embraced this analysis in *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003), a decision affirming an award of punitive damages that was 37.2 times compensatory damages. Judge Posner wrote:

> The award of punitive damages in this case thus serves the additional purpose of limiting the defendant's ability to profit from its fraud by escaping detection and (private) prosecution. If a tortfeasor is "caught" only half the time he commits torts, then when he is caught he should be punished twice as heavily in order to make up for the times he gets away.

347 F.3d at 677.

Mathias was a case involving bedbugs in a hotel, with evidence that defendant's conduct was "willful and wanton." *Id.* at 675. Judge Posner rejected defendant's argument that *State Farm* imposed a "single-digit-ratio rule." *Id.* at 676. Instead, Judge Posner wrote, "We must consider why punitive damages are awarded and why the Court has decided that due process requires that such awards be limited." *Id.* Thus, Judge Posner noted that defendant concealed its wrongdoing and that other hotel guests had been "endangered." *Id.* at 678. Judge Posner also took note of defendant's tactics of "investing in developing a reputation intended to deter plaintiffs," including "mount[ing] an extremely aggressive defense against suits such as this and by doing so to make litigating against it very costly. . . ." *Id.* at 677.[15]

Judge Calabresi adopted a similar analysis in *Ciraolo v. City of New York*, 216 F.3d 236 (2d Cir.) (Calabresi, J., concurring), *cert. denied,* 531 U.S. 993 (2000). Judge Calabresi noted that one goal of the tort system "is to ensure that actors bear the costs of their activities" and that a rational actor "will make some sort of formal or informal, spoken or unspoken, cost-benefit analysis . . . to determine if a particular activity is worth its price." *Id.* at 243. The system breaks down, however, if the actor is not held responsible for the costs of his actions. *Id.* This is the

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[15] Judge Posner stated that "modest stakes" were an additional disincentive to sue. *Id.* In the tobacco litigation, while the potential damages are much greater than a case involving bedbugs, so too are the litigation costs.

case when a tortfeasor conceals wrongful conduct. *Id.* This is also the case when not all tort victims bring suit (due to, among other things, "the time, effort, and stress associated with bringing a lawsuit."). *Id.* at 243-44. Judge Calabresi wrote:

> This idea is far from new. Many years ago, in an influential article that was in part responsible for his receipt of the Nobel Memorial Prize in economics, Professor Becker pointed out that charging a thief the cost of what he had stolen would not adequately deter theft unless the thief was caught every time. Since thieves will not always be caught, they must be penalized by more than the cost of the items stolen on the occasions on which they *are* caught. This "multiplier" is essential to render theft unprofitable and properly to deter it. . . . More recently, scholars have recognized that punitive damages can serve the same function in tort law.

Id. at 244 (emphasis in original), citing Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 POL. ECON. 169 (1968); Thomas C. Galligan, Jr., *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990), and A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 11 HARV. L. REV. 870 (1998).

Judges Posner and Calabresi both recognized that the assessment of punitive damages is not an exact science. As Judge Posner wrote in *Mathias*, "The judicial function is to police a range, not a point." 347 F.3d at 678. Similarly, Judge Calabresi wrote in *Ciraolo:*

> Such a calculation would rarely be precise. A rough estimate, however, would not be more unlikely than many other estimates that courts currently ask juries to make. Thus, juries are routinely required to estimate the monetary value of a plaintiff's pain and suffering, or of the loss sustained by a family as a result of a wrongful death, a sum that "defies any precise mathematical computation."

216 F.3d at 246 n.7 (citations omitted).

This Court cited Judge Calabresi's concurrence and supporting literature and discussed the issue of "defendant's evasion of liability" in *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 438-40 (2001). The Court expressed concern that "juries do not normally engage in such a finely tuned exercise of deterrence calibration." *Id.* at 439. This analysis, however, was in the context of whether a jury award of punitive damages was a finding of fact that implicated the Seventh Amendment, not whether economic deterrence analysis could be used to assess punitive damages. Thus, this Court indicated that the economic efficiency approach might be "attractive . . . as an abstract policy matter" and further stated that a defendant's "'morally offensive conduct'" might be an additional consideration. *Id.* at 339-40 (citations omitted); *see also* Polinsky & Shavell, *supra*, at 907 n.120 (if a reprehensible act "is purely intentional, overdeterrence cannot occur.").

In the present case, unless Petitioner's repeated misconduct – including concealment of documents establishing legal liability – is taken into account, neither punishment nor deterrence will be achieved. Petitioner was able to conceal its wrongdoing until the release of its internal documents, decades into its fraud. Yet the punitive damages award of $79.5 million in this case amounts to only a little more than 2½ weeks of Petitioner's profits. *Williams I*, 48 P.3d at 841. Unless this award is upheld, the message to Petitioner – and other industries – will be to conceal wrongdoing and avoid legal liability, at all costs.

B. There Is No "Mathematical Bright Line" for Punitive Damages

The purposes of punitive damages can be achieved in this case, and the punitive damages award affirmed, within the parameters of this Court's three "guideposts." *See Gore*, 517 U.S. at 574-75. Two of the guideposts – the degree of reprehensibility ("[p]erhaps the most important indicium of the reasonableness of a punitive damages

award," *id.* at 575) and sanctions for comparable misconduct (manslaughter in this case) – overwhelmingly support the award. Petitioner focuses on the third guidepost, the ratio of punitive to compensatory damages.

But this Court has repeatedly stated that there is no "mathematical bright line" for a punitive damages award. *See, e.g., State Farm*, 538 U.S. at 424-25 ("[W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. . . .We decline again to impose a bright-line ratio which a punitive damages award cannot exceed."); *Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula. . . ."); *Haslip*, 499 U.S. at 18 ("We need not, and indeed we cannot, draw a mathematical bright line. . . .").

This case presents a paradigm for exceeding a single-digit ratio, given the magnitude of Petitioner's wrongdoing and the resulting consequences. Certainly, if an award of 526 times actual damages can be affirmed in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993), a case that involved slander of title for oil and gas rights and not the slightest physical harm to a single person, an award of 97 times actual damages should be affirmed in the present case. As the plurality stated in *TXO*, "[W]e do not consider the dramatic disparity between the actual damages and the punitive award controlling in a case of this character." *Id.* at 462 (citing factors including "malicious and fraudulent" conduct, "the amount of money potentially at stake," "the bad faith of petitioner," and "the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit.").[16]

Thus, even taking a restrictive view, this case is, in the words of the majority in *State Farm*, one of the "few

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[16] The comparison with *TXO* is similarly favorable if the reference is to "possible harm to other victims that might have resulted if similar future behavior were not deterred." *Id.* at 460.

awards exceeding a single-digit ratio" to satisfy due process. 538 U.S. at 425.[17].

C. The Harm to Nonparties Is Particularly Relevant in This Case Given Petitioner's Decades of Wrongdoing

This case also underscores the necessity of a case-by-case approach in evaluating the effect of a defendant's conduct on nonparties. Without the flexibility to assess each case on its own facts – and, in this case, take into account the harm to thousands of identically-situated Oregonians – the purposes of punitive damages cannot be achieved.

This Court has recognized the relevance of harm to nonparties when justified by the facts. For example, the plurality in *TXO* noted that evidence of defendant's "alleged wrongdoing in other parts of the country" is "[u]nder well settled law . . . typically considered in assessing punitive damages." 509 U.S. at 462 n.28.

In *State Farm*, this Court's concern was "dissimilar acts":

> The [Utah] Courts awarded punitive damages to punish and deter *conduct that bore no relation* to the Campbells' harm. *A defendant's dissimilar acts, independent from the acts upon which liability was premised*, may not serve as the basis for punitive damages. A defendant should be

[17] The ratio issue is of even less consequence under the analyses of the three justices who dissented in *State Farm*. *See State Farm*, 538 U.S. at 429 (Scalia, J., dissenting) ("[T]he Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages."); *id.* at 429 (Thomas, J., dissenting) ("'I continue to believe that the Constitution does not constrain the size of punitive damages awards.'") (citations omitted); *id.* at 439 (Ginsburg, J., dissenting) ("Even if I were prepared to accept the flexible guides prescribed in *Gore*, I would not join the Court's swift conversion of those guides into instructions that begin to resemble marching orders.").

> punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business.

538 U.S. at 422-23 (emphasis added). But *State Farm* recognized that similar wrongful acts are relevant, stating, for example, that, "Although *evidence of other acts need not be identical to have relevance* in the calculation of punitive damages, the Utah court erred here because evidence pertaining to *claims that had nothing to do* with a third party lawsuit was introduced at length." *Id.* at 423-24 (emphasis added).

Here, Petitioner's "other" wrongful acts were not only similar, but identical, to the acts that harmed respondent. As the Oregon Supreme Court stated, "[T]he jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large." *Williams*, 127 P.3d at 1175. The Oregon Supreme Court also specifically found that Philip Morris's conduct did harm other smokers.[18]

The relevance of harm to nonparties is of particular importance here because of Petitioner's success in concealing its wrongdoing and evading liability to other smokers. Evidence of Petitioner's litigation conduct was before the jury in this case. *See* Pet'r Br. 2 (evidence included "litigation positions"). In addition, the Oregon Court of Appeals recognized the concealment of industry documents, stating that, "The extent of defendant's actions did not become clear until judicially-required releases of documents occurred in the 1990s." *Williams I*, 48 P.3d at 840. There

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[18] The Oregon Supreme Court rejected Petitioner's arguments that its fraud did not injure nonparties, stating, "In essence, Philip Morris is claiming that one cannot reasonably infer that anyone was actually fooled by its 40-year advertising campaign directed to thousands of Oregonians. . . . Philip Morris's own conduct belies its protestations. As a for-profit corporation, it would not spend over 40 years of time, effort, and money to deceive people, unless it thought it was succeeding." *Williams*, 127 P.3d at 1171 n.1.

can be little doubt that had those documents been released earlier, the litigation results would have been dramatically different. Industry counsel recognized this; as attorney David Hardy wrote, the effect would "undoubtedly be devastating." Letter from David Hardy, *supra*.

This is not to say, however, that Petitioner should be punished for "hypothetical claims." *See State Farm*, 538 U.S. at 423 ("Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims. . . ."). Nonparties' claims are not being adjudicated, and nonparties are not being awarded damages. Instead, it is Petitioner's own conduct that is at issue. Indeed, Petitioner concedes that harm to nonparties may be considered, but only to determine where "within a confined range" – i.e., a single-digit ratio – the punitive damages award should fall. Pet'r Br. 22. Among other things, however, Petitioner's argument ignores this Court's repeated admonitions that there is no "mathematical bright line."[19]

Petitioner also raises the specter of multiple punishment for the same conduct. Here is a company that engaged in decades of deceit, killing thousands upon thousands, but, because of its abusive litigation tactics, has scarcely been touched by damages awards to smokers. *See, e.g.*, Pet'r Br. 13 ("[I]n the more than 50-year history of smoking-and-health litigation, only two individual cases have ever gone to trial in Oregon: the other claims were either voluntarily withdrawn, not pursued, or dismissed during motion practice."). Nevertheless, Petitioner cries wolf and argues that it is "in danger of being punished

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[19] *See also Gore*, 517 U.S. at 603 (Scalia, J., dissenting) ("[A] person cannot *be held liable to be punished* on the basis of a lawful act. But if a person has been held subject to punishment because he committed an *un*lawful act, the *degree* of his punishment assuredly *can* be increased on the basis of any other conduct of his that displays his wickedness, unlawful or not.") (emphasis in original).

repeatedly for the same harms." Pet'r Br. 8. A 50-year history belies that claim.[20]

And while industry documents are now available to potential plaintiffs, many thousands of smokers are long dead and for many reasons cannot, contrary to Petitioner's recommended jury instruction in this case, "bring lawsuits of their own."

CONCLUSION

Amicus respectfully submits that our legal system must empower justice in the present case through a jurisprudence of punitive damages that accomplishes the purposes of punishment and deterrence. The judgment of the Oregon Supreme Court should be affirmed.

Respectfully submitted,

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September 2006

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[20] The threat of multiple punitive awards is also checked by an Oregon statute that takes into account "[t]he total deterrent effect of other punishment imposed upon the defendant as a result of the misconduct, including, but not limited to, punitive damage awards to persons in situations similar to the claimant's. . . ." Or. Rev. Stat. 30.925(2)(g); *see also* Or. Rev. Stat. 31.730(3).